

SAN CARLOS APACHE TRIBE, ET AL.

IBLA 97-299, 97-311, 98-142, 98-173

Decided May 21, 1999

Appeals from a decision by the Arizona State Director, Bureau of Land Management, approving an exchange and decisions dismissing protests against an exchange of public for private land. AZ-040-7122-00-5514; AZA-28789.

Affirmed.

1. Environmental Quality: Environmental Statements–National Environmental Policy Act of 1969: Environmental Statements

NEPA is primarily a procedural statute designed to insure a fully informed and well-considered decision. It requires that an agency take a "hard look" at the environmental effects of any major Federal action. An EIS must fulfill the primary mission of NEPA, which is to ensure that a Federal agency, in exercising the substantive discretion afforded it to approve or disapprove a project, is fully informed regarding the environmental consequences of such action. In deciding whether an EIS has done so, it is well settled that a rule of reason will be employed such that the question becomes whether the statement contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.

2. Environmental Quality: Environmental Statements– Exchanges of Land: Generally–Federal Land Policy and Management Act of 1976: Exchanges–National Environmental Policy Act of 1969: Environmental Statements–Private Exchanges: Protests–Private Exchanges: Public Interest

BLM properly denies a protest to a proposed land exchange where the protestant fails to demonstrate that BLM violated the public interest requirement of section 206(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(a) (1994), or Executive Order No. 12898.

3. Environmental Quality: Environmental Statements–Mining Claims: Plan of Operations–National Environmental Policy Act of 1969: Environmental Statements

NEPA requires that an EIS consider alternatives to the proposed action and Federal agencies are required to use, to the fullest extent possible, the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment. Where BLM has identified and carefully assessed the reasonable alternatives, the action will be affirmed.

APPEARANCES: Joe P. Sparks, Esq., Kevin T. Tehan, Esq., and John H. Ryley, Esq., Scottsdale, Arizona, for the San Carlos Apache Tribe; John S. Guttman, Esq., Virginia S. Albrecht, Esq., and Fred R. Wagner, Esq., Washington, D.C., for Phelps Dodge Corporation; Peter Galvin, Esq., Tucson, Arizona, for Southwest Center for Biological Diversity; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

In a February 7, 1997, Record of Decision (ROD), the Arizona State Director, Bureau of Land Management (BLM), authorized the exchange of public lands managed by BLM for private lands owned by Phelps Dodge Morenci, Inc., that is described as the Equal Appraised Value Alternative on page (at) 2-8 of the Final Environmental Impact Statement (FEIS), Morenci Land Exchange, prepared by the Gila Resource Area, Safford District, BLM, and issued in October 1996 (EIS No. BLM/AZ/PL-96/008).

The San Carlos Apache Tribe (San Carlos or the Tribe) (IBLA 97-299) and the Southwest Center for Biological Diversity (Southwest) (IBLA 97-311) (collectively Appellants) each filed timely notices of appeal. Petitions for Stay of the State Director's decision were granted by the Board of Land Appeals (Board) on May 21, 1997. The Board subsequently suspended consideration of IBLA 97-299 and IBLA 97-311 in order to allow BLM to consider protests of the proposed exchange entered by Appellants. The appeal of a third Appellant, Laser Inc. (IBLA 97-314), was dismissed for lack of standing.

On January 5, 1998, the Director, BLM, dismissed the protests of Appellants. Appellants appealed the January 5, 1998, decisions to the Board. These appeals were docketed as IBLA 98-142 and IBLA 98-173, respectively, and have been consolidated by the Board with IBLA 97-299 and IBLA 97-311. The Board subsequently granted Appellants a stay of the January 5, 1998, BLM decisions.

The ROD approved a land exchange between the Safford Field Office, BLM, and Phelps Dodge. According to the ROD:

The approved exchange is a modification of the Equal Appraised Value Alternative presented in the Morenci Land Exchange Final Environmental Impact Statement. It involves trading 3,605.24 acres of Bureau of Land Management-administered public lands located in Greenlee County, Arizona for 1,040.00 acres of private lands owned by Phelps Dodge Corporation located in Graham, Greenlee, Cochise, and Pima Counties. The public and private lands involved in this trade have been appraised, by methods approved by the Federal Government, and are substantially equal in dollar value. The appraised value of the offered lands and the selected lands are within 3 percent of each other. Approval of the land exchange will bring lands with important resource and public land management values into public ownership and transfer BLM-managed public lands to private ownership. The public lands transferred to Phelps Dodge Corporation ownership are expected to be used for mining purposes that will enable Phelps Dodge to expand and continue operation of some features of the Morenci copper mine.

(ROD at 1-2.)

In their appeals to this Board, Appellants make a number of separate arguments why the land exchange should be disapproved. Appellant San Carlos' May 5, 1997, Statement of Reasons (SOR) with respect to the appeal of the initial BLM decision, and which effectively incorporates all arguments of Southwest, is used for reference. Respondent BLM's Answer to Appellants' claims, filed May 29, 1998, will likewise be referred to when citing BLM's response to arguments. Appellants make separate arguments under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 (1994), the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 (1994), and arguments that implicate both statutes.

In their collective appeals, Appellants claim that BLM ignored cumulative impacts and a "no action" alternative in violation of NEPA in developing the FEIS. (SOR at 5.) Appellants state that the FEIS is fundamentally flawed because BLM failed to consider past, present, or future cumulative environmental impacts from the expansion of the existing Phelps Dodge Morenci mining operation which will occur because of the land exchange. BLM responds that the discussion was adequate because the treatment of alternatives, when judged against the rule of reason, was sufficient to permit reasoned choices among various options. (Answer at 36.) Citing North Buckland Civic Ass'n v. Skinner, 903 F.2d 1533 (11th Cir. 1990), and Laguna Greenbelt Inc. v. U.S. Dept. of Transp., 42 F.3d 517

(9th Cir. 1994), Respondent urges that, as here, the range of NEPA alternatives need not extend beyond those reasonably related to the purposes of the project. Id. BLM states that this is the situation with the "no action" alternative. BLM claims that, just as in Western Colorado Congress, 130 IBLA 244 (1994), BLM in this case is without authority under the statutory scheme to completely deny development activities. BLM states that, even if this exchange were not to proceed, it cannot deny Phelps Dodge's mineral development rights to their 228 mining claims encumbering the selected lands. (Answer at 37.)

Appellants next claim that BLM remains independently responsible for ensuring that approval of the land exchange will not result in significant environmental impacts. (SOR at 7.) Appellants claim that BLM is incorrect in stating throughout the FEIS and ROD that, since Phelps Dodge will be required in the future to obtain environmental permits or comply with state regulatory mining laws, such permitting and regulatory process should preclude any significant environmental impacts, and therefore no environmental assessment is necessary. Id. Moreover, Appellants claim, BLM violates NEPA when it shifts the responsibility to state agencies at sometime in the future to assess and mitigate environmental impacts. Id. In response, BLM states NEPA requires agencies to consider the environmental consequences of proposed actions before they are implemented and that BLM has met its "hard look" requirements in this case. (Answer at 11.) BLM notes that the ROD identifies the following required mitigation actions: threatened and endangered species; wild and scenic rivers; third party mining claims; mineral withdrawals; access to public lands; rights-of-way; visual resources; cultural resources; hazardous substances; and grazing. (Answer at 10-11, citing ROD at 3-4.) Respondent explains that, although exchange AZA-28789 will remove BLM's authority to regulate mining-related uses of the selected lands (Answer at 16), Appellants are incorrect in arguing that loss of BLM regulation will reduce regulation of Phelps Dodge's Morenci mine. Key Federal laws such as the Clean Water Act, 33 U.S.C. § 1251 (1994), Endangered Species Act, 16 U.S.C. § 1531 (1994), and Clean Air Act, 42 U.S.C. § 7401 (1994), will continue to apply to Phelps Dodge's mining operations at Morenci and elsewhere, regardless of the land ownership status. (Answer at 16-17.) State surface mining regulations will also be applicable. According to Appellants, reclamation on private lands in Arizona is regulated by the Arizona Mined Land Reclamation Act, Arizona Revised Statutes 27-901 et seq. Protection of underground water on private land in the mine area is regulated by the Aquifer Protection Permit (APP) program administered through the Arizona Department of Environmental Quality. (Answer at 17, citing Arizona Revised Statutes 49-241 et seq.)

Appellants' next three claims are directly related. The third claim is that the FEIS fails to adequately review how the selected lands will be used in the mining operation of Phelps Dodge, and the fourth is that BLM failed to consider any environmental impacts from the existing Morenci operation. (SOR at 9-10.) Appellants claim that BLM has failed to assess the environmental impacts from any of the reasonably foreseeable uses of

the selected lands, to include open pit mining, the deposit of mill tailings, the leaching of mill tailings, and for supporting mineral operations. (SOR at 8.) Appellants also assert that BLM's assumption that the same environmental consequences will occur if BLM disapproves the land exchange is false. (SOR at 10-11.) Appellants argue that, if the land remains in the Federal domain, BLM would continue to regulate the lands under the Federal mining laws and regulations, which would require a NEPA analysis under a mining plan of operations under FLPMA, and would include Federal bonding, reclamation, mitigation, and continued Federal supervision over Phelps Dodge in the future. (SOR at 10.) Appellants claim that BLM fails to address this under the "no action" alternative, and therefore the FEIS is grossly inadequate. (SOR at 10.)

In its Answer, BLM states that it gave careful consideration to the appropriate scope of analysis to be presented in the FEIS. (Answer at 54.) In so doing, BLM states it utilized guidance from Council on Environmental Quality (CEQ) regulations at 40 C.F.R. Part 1500. Id. Although BLM came to the conclusion that exchange AZA-28789 and the existing mining operation, located on private land, could not be considered to be connected, cumulative, or similar actions, mining-related impacts resulting from foreseeable uses are presented in Chapters 3 (Affected Environment) and 4 (Environmental Consequences) and are summarized in Table 2-3 at 2-18 to 2-32 of the FEIS. Id. Respondent states that BLM did not analyze "direct" adverse effects from mining within the context of the FEIS because mining is not, under applicable CEQ regulations, a "direct" impact of the land exchange. (Answer at 55.) Direct effects of a land exchange are defined at 40 C.F.R. § 1508.8(a) as those which are "caused by the action and occur at the same time and place." BLM states that the reason mining and/or mineral development is not a direct effect is that "[m]ining-related activities on the selected lands would be the same for all alternatives." See FEIS at 2-10. For the same reason, BLM claims, reasonably foreseeable mining-related uses of the selected lands did not constitute "indirect effects" of the exchange decision. (Answer at 56, citing FEIS, Chapter 4, at 4-13 to 4-14.) BLM states that Appellants would have the Board conclude that exchange AZA-28789 would, in some way, circumvent the mining law. BLM claims that nothing could be further from the truth, and that the subject of the NEPA analysis is a proposed land exchange and not a plan of operations filed pursuant to 43 C.F.R. § 3809.1-4. BLM states that the authority to conduct land exchanges is provided in section 206 of FLPMA, and that whether the exchange facilitates the "consolidation" of "mineral * * * interests" can be, and in this case, was a factor in making the required "public interest" determination. (Answer at 30.)

BLM states that Appellants are also incorrect to argue that loss of BLM regulation will reduce regulation of Phelps Dodge's Morenci mine if the selected lands transfer to private ownership. In addition to the key Federal laws cited above that will continue to apply to the mining operations at Morenci, state reclamation regulations will apply to the limited acreage, of the 3,000 plus acres to be transferred, which Morenci plans to

mine. State surface mining regulations and aquifer protection laws will also be applicable. (Answer at 16-17.) BLM presented a comparison within the FEIS of how 14 Federal and state statutes and regulatory provisions would apply to mining related site development on public and private lands. (Answer at 22, citing FEIS at 2-11.) BLM pointed out that the only Federal statute or regulation that did not apply to private land mine development was the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 (1994). Id. The FEIS later stated that as of May 1, 1996, no Native American grave site had been identified on the selected lands. (Answer at 23, citing FEIS at 3-37, ROD at 7.) Moreover, BLM argues that the conclusory statements of Appellants are not girded by any evidence that would support their claims that enforcement would be any less rigorous under state regulation (Answer at 43), or that the Morenci mine is not properly regulated.

Appellants' next contend that BLM failed to consider cumulative impacts with respect to the Safford Land Exchange, which involves land separate from the current proposed exchange. (SOR at 12.) Appellants argue that the combined effect of these two land exchanges in the same area, with the same company, for the same mining purposes, will have a profoundly adverse synergistic impact upon the water resources of the Tribe, air quality, and cumulative adverse environmental impacts. Id. BLM responds that this subject was in fact addressed in the FEIS at 4-29 through 4-35, where it specifically identified the Safford exchange plus other land management actions with and/or by mining companies in the area. (Answer at 56-57.) Similarly, BLM states that it identified mineral development, including Phelps Dodge development of the Dos Pobres, San Juan, Lone Star, and Sanchez mine properties, all included within the Safford Land Exchange, as among reasonably foreseeable future actions. (Answer at 58.) BLM described the cumulative effects of exchange AZA-28789 on physical resources (proposed action alternative) in the FEIS, as follows:

Implementation of the Proposed Action would result in BLM's acquisition of important aquatic resources at Eagle Creek. The BLM would dispose of two springs, one ephemeral and one perennial, on the selected lands and would acquire one perennial spring on the Stewart Trust property. Surface and groundwater quality and air quality would not be affected by the Proposed Action. Within the region, past and foreseeable actions that have the potential to impact water and air resources are regulated by numerous federal and state regulations including the CWA, CAA and APP program. Considering the direct and indirect impacts of the Proposed Action in light of land tenure adjustments and the protections provided by existing environmental regulations, the Proposed Action does not have the potential to contribute to or result in cumulative adverse impacts to physical resources.

(Answer at 58, quoting FEIS at 4-32 through 4-33.)

Appellants next contend that BLM failed to address environmental impacts in the FEIS and the ROD, and that BLM failed to conduct an independent review because the drafting of the EIS was largely completed by a contractor. They claim that BLM's FEIS fails to contain sufficient information to adequately assess environmental impacts that must be addressed, and that it (the FEIS) contains unsupported findings and conclusions. (SOR at 12, 13.) In response, BLM answers that it did address environmental impacts and the required mitigation, for example, with respect to threatened and endangered species, wild and scenic rivers, third party mining claims, mineral withdrawals, access to public lands, rights-of-way, visual resources, cultural resources, hazardous substances, and grazing. (Answer at 10-11, citing ROD at 3-4.) Respondent argues that Appellants' pleadings contain much that can only be classified as conclusory statements without documentation or support. (Answer at 15.) For example, Respondent states, the claim that BLM somehow determined in 1994 to exchange the selected lands prior to environmental analysis, the claim that BLM failed to address environmental justice concerns, the claim that BLM's range of alternatives is inadequate and violates NEPA, and the claim that the San Carlos Apaches were inadequately consulted on the cultural resource values of the selected lands, are all charges leveled as conclusory statements without evidentiary support. (Answer at 15-16.) BLM claims that Appellants consistently ignore within their SOR's, and elsewhere, the purpose, extent and scope of BLM's mitigation efforts. (Answer at 11.)

Appellants claim that BLM failed to conduct an independent environmental review, as required, because BLM delegated some of the preparation of the EIS to SWCA, Inc. (SOR at 13-14.) BLM responds that 42 U.S.C. § 4332 (1994) allows the responsible Federal official to delegate some of the preparation of an EIS, but that the Federal agency must bear the responsibility for the ultimate work product. (Answer at 64.) Citing Seattle Audubon Society v. Lyons, 871 F. Supp. 1291, 1319 (W.D. Wash. 1994), aff'd 80 F.3d 1401 (9th Cir. 1996), BLM notes that courts generally defer to an agency's methodological approach to EIS development and urges that the record before us does not justify an exception to the rule of deference to BLM's use of SWCA, Inc., in EIS preparation and development. (Answer at 65.)

Appellants next claim that BLM failed to comply with the scoping requirements of NEPA. (SOR at 14.) Appellants allege that section 1508.25 of the CEQ guidelines specify the obligation of the responsible Federal agency to address connected, cumulative and similar actions that are related to the subject action. Id. Appellants urge that the Safford Land Exchange must be addressed in conjunction with the Morenci Land Exchange and any claim that the two are independent of each other "has no underlying factual basis, and is simply false." (SOR at 14.) In response, BLM states that it rigorously applied the definition of "scope" from 40 C.F.R. § 1508.25 to the Morenci EIS. BLM states the Morenci and Safford exchanges exist independent of the other and are not connected actions for purposes of NEPA, citing Northwest Resource Information Center, Inc. v. National

Marine Fisheries Service, 56 F.3d 1060 (9th Cir. 1995). (Answer at 80.) BLM states that it did include the proposed Safford Land Exchange in the "Cumulative Impacts Context—Past, Present and Future Actions" section of the FEIS, at 4-30. Id. In addressing the scoping issue, BLM explains that its initial scoping procedures for AZA-28789 included a Notice of Intent in the Federal Register, articles and notices in newspapers of local and statewide distribution, and four public meetings. After release of the Draft EIS, BLM states that it solicited additional public comment through another Federal Register notice, publications in local and statewide newspapers, and three public meetings. (Answer at 79-80.) BLM further states that informational and/or scoping meetings were offered to several tribes, including the San Carlos Apache Tribe. Issues and comments raised during initial scoping were addressed in the Draft EIS. Comments on the Draft EIS were addressed in the FEIS. (Answer at 80.)

Appellants argue next that BLM improperly assumes that since environmental permits have to be obtained by Phelps Dodge, there will not be any adverse environmental impacts from the mining operation. (SOR at 14-15.) Appellants claim that BLM has thereby abdicated its Federal regulatory authority and breached its duty to regulate public lands. (SOR at 15.) Related to this argument is the Appellants' claim that BLM has failed to address the transfer of environmental regulation from Federal to state authorities by approving the exchange. Appellants claim that BLM merely states that the environmental consequences will be the same, without providing any factual justification for this assumption. Id. BLM responds that there has been no such abdication of its Federal responsibilities nor has it ever refused to analyze environmental impacts because of a reliance on state permitting processes. (Answer at 20.) BLM states that the FEIS fully analyzes environmental impacts of the land exchange decision, including foreseeable uses of selected lands. Id. Citing the FEIS at 2-10 through 2-15 and especially Table 2-2, BLM notes that the references to the APP and other state and Federal permitting requirements identify the framework of regulatory compliance that will remain regardless of land status. Id. BLM states that the fact that Phelps Dodge must obtain a series of permits from these state and Federal agencies, which ensure protection for natural resources from industrial contamination, and that each agency will verify compliance with these permits in no way shows any abdication of responsibility by BLM. (Answer at 59.) Moreover, BLM states, Appellants have not substantively disputed the effectiveness and application of these permit requirements to Phelps Dodge's existing Morenci mine. Id.; see FEIS at 7-4 to 7-7.

Appellants' 12th claim is that BLM has failed to describe the environmental impacts from other reasonable alternatives, nor does BLM address, discuss, or require any mitigation or reclamation requirements. (SOR at 15-16.) Collateral to this charge is the claim that none of BLM's findings in the ROD are substantiated by any facts or analysis. (SOR at 16.) BLM responds that in the FEIS, it fully analyzed three alternatives: the required no-action alternative, the proposed action alternative, and

the "equal appraised value alternative" (preferred alternative). Notwithstanding Appellants' arguments to the contrary, BLM argues that the discussion of alternatives, including the no-action alternative, need not be exhaustive. (Answer at 39.) Citing Ayers v. Espy, 873 F. Supp. 455, 466 (D. Colo. 1994), BLM argues that NEPA merely requires an agency consider a range of alternatives that cover a full spectrum of possibilities, which must be sufficient to demonstrate reasoned decision-making. Citing also Woida v. United States, 446 F. Supp. 1377, 1387 (D. Minn. 1978); Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292, 1300 (8th Cir. 1976); Environmental Defense Fund, Inc. v. Corps of Engineers of the U.S. Army, 470 F.2d 289, 296-97 (8th Cir. 1972), BLM states that it carefully considered whether the no-action alternative should include or exclude mining use of the selected lands. In making its determination, BLM considered location of the selected lands in relation to the existing Morenci mine, provisions of the Mining Law of 1872, as amended, application of various other Federal and state laws to mining operations, and a recent court decision which followed established case precedent. (Answer at 40, citing ROD at 7.) BLM states that, because of Phelps Dodge's existing 228 unpatented mining claims on the selected lands, mining-related uses are reasonably foreseeable even if BLM had denied the land exchange. Respondent claims that, contrary to the argument of Appellant San Carlos at 11 of the SOR, BLM has not claimed the mining laws invalidate the requirements of proper environmental assessment under NEPA. (Answer at 43.) But similarly, BLM states, neither does NEPA preempt rights secured under the mining laws. Id. BLM further states that it examined three other alternatives, but that they were not studied in detail in the FEIS either because they did not meet the project purpose and need, did not conform to the Resource Management Plan (RMP), included inadequate information, presented jurisdictional problems, or presented unacceptable environmental impacts. (Answer at 39.) These alternatives included a BLM direct sale to Phelps Dodge and acquisition of offered lands through the Land and Water Conservation Fund, a minimized selected lands configuration, and a different offered lands package. (Answer at 38-39, see FEIS at 2-15 to 2-17.) Respondent claims that Appellants have failed to establish that BLM's decision to eliminate these and other alternatives was either arbitrary, capricious, or an abuse of discretion. (Answer at 39, citing 5 U.S.C. § 706(2)(A) (1994).)

Appellants' 14th claim asserts that BLM failed to adequately investigate and address air quality and water quality environmental impacts from the Phelps Dodge expanded mining operation. (SOR at 16.) BLM responds that it did not analyze adverse effects from mining within the context of the FEIS because mining is not, under applicable CEQ regulations, a "direct" impact of the land exchange. See 40 C.F.R. § 1508.8(a). The reason is because, as stated at FEIS 2-10, "[m]ining-related activities on the selected lands would be the same for all alternatives." (Answer at 55.) For the same reason (i.e., lack of causation), BLM explains, reasonably foreseeable mining-related uses of the selected lands did not constitute "indirect effects" of the exchange decision. In that regard, BLM cites Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S.

766, 103 S. Ct. 1556 (1983), which emphasizes that the terms "environmental effect" and "environmental impact" include a requirement for a reasonably close causal relationship between a change in the environment and the effect at issue. (Answer at 56, citing FEIS, 4-13 to 4-14.)

Appellants' 15th and 16th claims are related. Appellants allege that the entire environmental assessment process conducted by BLM is a sham and was conducted in bad faith, insofar as the policy decision to go forward with the transfers had effectively been made by the United States long prior to the purported environmental review. Similarly, Appellants also allege BLM failed to address environmental justice concerns. The FEIS, Appellants assert, should have contained an environmental justice analysis, but did not. The few consultations BLM had with the Tribe, Appellants claim, addressed only cultural resources on the selected lands, while ignoring all other concerns of the Tribe. (SOR at 17.) Addressing first the EIS process, BLM states that it spent nearly 3 years in the analysis of exchange AZA-28789, and that this analytic process included production of baseline studies, numerous public meetings, preparation and release of a Draft and an FEIS, responses to public comments, and consultation with Indian tribes including the San Carlos Apache Tribe. (Answer at 59.) BLM calls attention to the affidavits of Margaret L. Jensen, BLM Program Manager, and Gay M. Kinkade, BLM Archaeologist, which establish that BLM expended well over 1,500 hours of consultation effort with 11 tribes during this process. (Answer at 59, citing FEIS at 5-2 to 5-3, ROD at 9.) Mr. Kinkade's affidavit establishes that BLM consulted with 11 Indian tribes: San Carlos Apache Tribe, White Mountain Apache Tribe, Fort Sill Apache Tribe, Tohono O'odham Nation, Gila River Indian Community, Salt River Pima-Maricopa Indian Community, Ak-Chin Indian Community, Hopi Tribe, Navajo Nation, and Zuni Pueblo. (Kinkade Affidavit, ¶¶ 9, 11.) BLM consultation efforts with each tribe included certified letters to tribal governments, public scoping meetings, scoping meetings on reservations, meetings with tribal councils, archaeological and ethnographic research, cultural resource inventory, meetings with tribal staff and tribal advisory committees, interviews with tribal elders, field trips to the selected lands, tribal review of draft plans, draft reports, and Draft EIS, letters, and phone calls. Id. Attachment No. 1 to the Kinkade Affidavit enumerates the 623 total coordination actions, of which 146 were with the San Carlos Apache Tribe. The consultation actions with San Carlos included 27 letters to and 6 from the San Carlos Apache Tribe, 88 phone calls to and 17 from the San Carlos Apaches, and 8 meetings (including field trips) with the San Carlos Apaches. Id. BLM states that beyond the issue of consultation, there are other responses to Appellants' "bad faith" argument. These include extensive baseline studies from which the impact analysis/conclusions presented at FEIS, Chapter 4, were derived. (Answer at 63, citing FEIS at R-1 to R-6.) The Baseline Resource Reports prepared in conjunction with the land exchange included a land use overview, biology overview, reports on grazing, encumbrances, recreation and access, visual quality, air quality, water resources, manageability, and cultural resources. Id.

With respect to the allegation that environmental justice concerns were ignored, BLM claims that it did review the land exchange for compliance with the Secretary's "Environmental Justice Policy" dated August 17, 1994. In fact, BLM claims, that is exactly what it did in its summary at FEIS, 5-4, where it stated that it had not discovered any adverse environmental impacts accruing from the land exchange that would disproportionately affect minority and/or low income groups, including Native Americans. (Answer at 82-83.)

Appellants' 17th and 18th claims are related. The 17th claim is that BLM deliberately failed to portray, depict, or illustrate the spatial relationship between the entire San Carlos Indian Reservation and the selected lands. (SOR at 17-18.) Appellants' 18th claim is that BLM failed to portray, depict, or illustrate the full and complete extent of national forests and wilderness areas adjoining or proximate to the selected lands anywhere in the FEIS. Id. at 18. In response, BLM states that the locations of the San Carlos Apache Reservation and other significant geographic features are displayed at several places in the FEIS. (Answer at 80.) BLM notes that Figure 1-1, at FEIS 1-2, depicts portions of the Reservation boundary closest to the study area and that Figure 2-1, at FEIS 2-3, depicts the relationship of the selected lands to the Forest Service boundary in the study area. (Answer at 81.) Moreover, BLM states, Figure 2-6, at FEIS 2-3, depicts, in color, land ownership including Forest Service, BLM, State, Phelps Dodge private land, and non-Phelps Dodge private land in the vicinity of the study area, while Figure 3-1, at FEIS 3-2, depicts portions of the Reservation in relation to the study area, other Forest Service units, counties and towns in southeastern Arizona. Id. Finally, BLM notes that Figures 3-2, 3-3, 3-5, 3-6, 3-7, and 3-9, respectively, within the FEIS, depict: (1) the Forest Service boundary in relation to selected lands plant communities; (2) the selected lands in relation to area drainages and rivers; (3) the land ownership in the study area in color; (4) the selected lands, access routes, and the Forest Service boundary; (5) the selected lands, Forest Service boundary, and allotment boundaries; and (6) the Forest Service boundary, selected lands, and viewpoint locations. Id. BLM states that the spatial relationship argument was never raised in comments on either the Draft or FEIS. Id.

Appellants next argue, in submission number 19, that the FEIS was not a final product of BLM, but that SWCA, Inc., prepared all environmental baseline studies and prepared the FEIS, which was rubber-stamped by BLM. This is a repetition of an earlier claim in which BLM responded that 42 U.S.C. § 4332 (1994), allows the responsible Federal official to delegate some of the preparation of an EIS, but that the Federal agency must bear the responsibility for the ultimate work product. (Answer at 64.) Citing Seattle Audubon Society v. Lyons, 871 F. Supp. at 1319, BLM noted that courts generally defer to an agency's methodological approach to EIS development. (Answer at 65.)

In claim number 20, Appellants state that they join in the claims of the Bureau of Indian Affairs (BIA) in objecting to the determination by

BLM that the following issues are beyond the scope of the FEIS: Phelps Dodge mining activities; water resources and cumulative impacts to this resource; a discussion of the existing regulatory framework for the future foreseeable uses of the lands; transition from Federal stewardship to private ownership and state jurisdiction, and the associated impacts; and a Programmatic Memorandum of Understanding regarding a cultural resource migration plan. (SOR at 18-19.) BLM does not address this claim directly in its Answer as a unique or distinct objection; but has addressed water resources, cumulative impacts, transition from Federal stewardship, and cultural resources in the context of the applicable regulatory structure both in the FEIS and in its Answer as described earlier. We note that BIA is not a party to this case and has not challenged either the FEIS or the ROD. Supposed objections by BIA or any other agency not before the Board as a party to this decision will not be considered in this appeal.

Appellants next argue that the FEIS and ROD regarding the land exchange violate FLPMA, 43 U.S.C. §§ 1701-84 (1994), and in particular, 43 U.S.C. § 1716 (1994) (public interest and fair market evaluation), and 43 U.S.C. § 1732(b) (1994) (the Secretary shall take action to prevent unnecessary or undue degradation of the public lands). In claim number 21, Appellants argue that the public interest is not served as required under FLPMA because the transfer of the Selected Lands into the private ownership of Phelps Dodge surrenders all regulatory control by BLM over such lands. (SOR at 19.) BLM earlier set forth the continuing Federal and state regulatory control over these lands that will exist after transfer, and they will not be repeated here.

In response to the public interest claim, BLM states that the objectives and criteria for land resource management at BLM's Safford Field Office are provided in the 1991 Safford District RMP, as amended. It states that exchange AZA-28789 conforms to the Safford RMP, as amended, by reason that it identifies at Attachment 1, Map 27 (amended), the selected lands as among those public lands targeted for disposal. (Answer at 8.) BLM states that it specifically recognized in the FEIS and ROD that portions of the selected lands would be used to support and expand current mining-related operations. Id. at 7. In exchange, it claims, BLM would acquire private "offered" lands containing important natural and cultural resources and other values. Through the exchange, BLM states that it will achieve several public land management objectives, including improvement of resource management efficiency by disposing of isolated tracts of land, consolidation of ownership patterns within Long-Term Management Areas, and acquisition of lands with resource values. Id. BLM explains that these offered lands support a variety of sensitive plant and wildlife species, ecosystems, cultural and historical resources, scenic values, and include private lands within the Gila Box National Conservation Area. Id. at 7-8.

Appellants' claims 22 and 23 are related. Claim 22 alleges that BLM failed to analyze and assess environmental impacts to Indian trust resources. Appellants allege that past, present, and future adverse

impacts to the United States and Indian trust resources were not considered in determining whether the land exchange serves the public trust under FLPMA. (SOR at 21.) In claim 23, Appellants assert that FLPMA has been violated because BLM has not complied with NEPA in failing to assess the environmental impacts from the reasonably foreseeable mining uses of the selected lands. Id.

With respect to NEPA, BLM claims that it is well aware that it must look at "cumulative impacts" and "direct" and "indirect" "effects" of agency action. Citing 40 C.F.R. §§ 1508.7-1508.8. (Answer at 47.) BLM states, however, that Appellants are simply incorrect that the approval of the FEIS and ROD will in any way authorize or otherwise impact mining-related uses of the selected lands. It states that, under 40 C.F.R. § 1508.8(b), the "indirect" effects which BLM must analyze are limited to those "caused by the action" even though "later in time or farther removed in distance" provided they "are still reasonably foreseeable." Id. BLM reiterates that it is not required to analyze as an indirect effect that which will occur independent of the decision to approve exchange AZA-28789. (Answer at 47-48.) With respect to cumulative impacts, BLM states that while it must, under 40 C.F.R. § 1508.7, assess "reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions," this does not mean that it must consider mining-related use of the selected lands which will occur regardless of the decision under appeal. (Answer at 48.) Citing Save the Yaak Committee v. Block, 840 F.2d 714, 719 (9th Cir. 1988), BLM states that approval of exchange AZA-28789 and mining-related activities on the selected lands are not connected actions that, under 40 C.F.R. § 1508.25(a)(1), have to be analyzed together in an EIS. (Answer at 48.)

With regard to Appellants' resource-based impacts argument, BLM asserts that impacts to Indian trust resources are presented throughout the FEIS. Id. at 48. For example, it states that impacts to air and water quality from foreseeable uses of the selected lands are found in Chapters 3 and 4 of the FEIS. Id. BLM notes that the FEIS at 4-11 states that, since 1986, Phelps Dodge has collected groundwater quality data, and that quality data reflects that "Phelps Dodge's Morenci operations meet aquifer water quality standards, which are equivalent to primary drinking water standards set by the Environmental Protection Agency." (Answer at 50, quoting FEIS at 3-16.) Based on this data, BLM states the FEIS determined that "[s]urface and groundwater quality and air quality would not be affected by the Proposed Action." (Answer at 50, quoting FEIS at 4-32.) BLM states that it also addressed agency responsibility to tribal trust resources in the ROD, where the following response is offered:

Response 2. BLM has complied with its federal trust responsibility to Indian tribes in its preparation of the Morenci Land Exchange EIS and ROD. Compliance was accomplished through the completion of consultations with all interested Indian tribes and through the analysis of impacts to trust resources.

* * * * *

All known resources, values, and use opportunities that could be impacted by the land exchange were analyzed in the EIS, including all resources and values defined as Indian trust resources, i.e., legal interests in property held in trust by the United States for Indian tribes or individuals. All discussions of resources, values and uses, including trust resources and discussions of expected impacts are contained in the various resource sections of the EIS. While trust resources were not discussed in a separate section of the EIS, the resources analyzed consisted of all natural, cultural, and social resources, that may be affected by the land exchange.

(Answer at 52, 53, quoting ROD at 11.)

In claim number 24, Appellants assert that BLM improperly appraised the selected lands to be acquired by Phelps Dodge substantially below their true market value. Appellants claim that "valuation of the Selected Lands at only \$125.00 an acre by appraisers selected by Phelps Dodge violates the FLPMA regulations." (SOR at 22.) Appellants further claim that BLM failed to properly appraise the Selected Lands pursuant to 43 C.F.R. §§ 2201.3-2 to 2201.6. Id. In response, BLM states that it responded to questions about appraisal methodology in both the FEIS at 1-12 to 1-13 and in the ROD at 1-2. (Answer at 65.) Respondent notes that the appraisal process is defined in regulations at 43 C.F.R. Part 2200, and in the BLM Manual. Id. Citing Donna Charpie, 137 IBLA 45, 50 (1996), and Brent Hansen, 128 IBLA 17, 19 (1994), BLM argues that Appellants have not made the required evidentiary showing. (Answer at 65-66.) BLM asserts that Appellants have conducted no appraisals, have made no showing that there has been a change in the market that escaped the notice of BLM's appraisers during their review of the reports, and that Appellants have not met their obligation to make an affirmative showing concerning value. Id. at 66. BLM urges that the unsubstantiated charge that the selected lands are of grossly unequal value with the offered lands must be rejected. Id.

Appellants' 25th claim states that BLM failed to consider the Tribe's legal ownership rights to the selected lands. The Tribe alleges that part of the selected land lies within the exterior boundaries of the San Carlos Apache Reservation and that resolution of this dispute must be resolved before the land exchange may be approved by BLM. (SOR at 22-23.) In response, BLM asserts that it determined, after examining and researching these new claims, that no lands, selected or offered, involved in exchange AZA-28789 are within the surveyed boundary of the San Carlos Apache Reservation or any other Indian Reservation. (Answer at 67-68.) BLM states that the Appellant Tribe has raised a reservation boundary issue numerous times. The issue in the past involved location of the boundary for the mineral strip located north of Aravaipa Canyon and the boundary in the Gila Mountains north of Safford. Id. at 66. In this appeal (SOR at 4),

however, the Tribe asserts ownership of over 70,000 acres of claimed Tribal land presently under the jurisdiction of the Forest Service, BLM, and the State of Arizona. (Answer at 67.) Referring to the January 17, 1995, letter and attachments from Raymond Stanley, Tribal Chairman, BLM notes that these lands were not included on the boundary dispute map presented by the Tribe during scoping for this project. (Answer at 68.) In its Answer, BLM quotes from an affidavit of Mr. Scott Evans (Exhibit I to Answer), BLM's Morenci Project Manager, who avers:

It wasn't until May 5, 1997 that the Tribe finally articulated its claim of ownership of the Morenci selected lands in its Statement of Reasons, Appeal Docket No. 97-299. This claim was reaffirmed in the Tribe's April 17, 1997 protest letter.

7. From the perspective of the BLM, neither the Center nor the Tribe have developed clear parameters or understanding of this claim. Furthermore, they have not developed any form of evidence to ownership. With respect to the Safford Land Exchange proposal, the Tribe did at least prepare a map which describes their dispute to ownership of land near Safford. However, this map makes no connection to the lands in question near Morenci. Consequently, the BLM is left without a clear understanding of the boundaries being claimed by the Tribe in the Morenci area and clearly without evidence to support such claims.

(Answer at 69.) BLM notes that it also reviewed the Tribe's related claim to sovereignty over the selected lands. In response to a comment from Appellant Southwest during the comment period, and addressed in the FEIS, BLM determined:

The San Carlos Apache Tribe accepted compensation for loss of aboriginal lands, which included but were not limited to, the Morenci land exchange selected lands and therefore these lands are no longer sovereign tribal lands. An Executive Order dated November 9, 1871, created the White Mountain Reservation; an Executive Order dated December 14, 1872, added the San Carlos division to the existing White Mountain Reservation. Executive Orders dated August 5, 1873, and July 21, 1874, restored to the public domain former White Mountain Reservation lands in which the selected lands are located. On June 27, 1969, the Indian Claims Commission found that the San Carlos and White Mountain Apache tribes were entitled to recover the "fair market value of their aboriginal title lands," which included, but were not limited to, lands covered in the Executive Orders of August 5, 1873, and July 21, 1874. On September 12, 1972, the Indian Claims Commission awarded a final judgment to the San Carlos and White Mountain Apache tribes in a settlement of \$4,900,000 as compensation for these lands that had previously been taken from the tribes without compensation. Both the San Carlos and White Mountain Apache tribes agreed to this settlement by means

of resolutions passed unanimously by the respective Tribal Councils. Thus, neither the selected nor the offered lands are sovereign tribal lands belonging to the San Carlos Apache Tribe.

(Answer at 71-72, quoting FEIS at 7-54.)

Appellants' 26th claim asserts that the intended use of the selected lands will significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. While not addressing this claim directly as an individual response within its Answer, BLM did address the substance of Appellants' concerns in several places in its Answer and in the FEIS. For example, BLM states, rather than conflicting, the land exchange conforms to the Safford RMP, as amended, by reason that the RMP identifies the selected lands as among those targeted for disposal. (Answer at 8.) With regard to effects of the land exchange on trust resources, BLM carefully addressed air and groundwater impacts arising from the Morenci mine in Chapters 3 and 4 of the FEIS. Hydrologic studies, groundwater flow patterns and groundwater quality impacts of the Morenci mine were addressed in Chapter 3. See FEIS at 3-16, Answer at 49-50.) The "Cumulative Impacts" section of the FEIS concludes:

Surface and groundwater quality and air quality would not be affected by the Proposed Action. Within the region, present and foreseeable actions that have the potential to impact water and air resources are regulated by numerous federal and state regulations including the CWA, CAA, and APP program. Considering the direct and indirect impacts of the Proposed Action in light of past land tenure adjustments and the protections provided by existing environmental regulations, the Proposed Action does not have the potential to contribute to or result in cumulative adverse impacts to physical resources.

(Answer at 50-51, quoting FEIS at 4-32 to 4-33.) BLM notes that the analysis of exchange AZA-28789 took nearly 3 years and included production of baseline studies, numerous public meetings, preparation and release of Draft and FEIS's, responses to public comments, and extensive consultation with the San Carlos Apache Tribe. (Answer at 59; FEIS at 5-2 to 5-3; ROD at 9.) While BLM acknowledges that 43 C.F.R. § 2200.0-6(b)(2) requires that the authorized officer may complete an exchange only after a determination that the public interest will be well served, and that the intended use must not conflict with established management objectives on adjacent Federal lands and Indian trust lands, neither the Tribe nor Southwest has identified how or to what extent the proposed exchange will conflict with any applicable BLM or Tribal plans. See Answer at 78.

Appellants' claims 27-29 allege (1) that the land exchange is not in the public interest because the ROD and the FEIS violate the requirements of both FLPMA and NEPA, (2) that BLM failed to exercise its Federal trust responsibility to the tribe and consider the water resources of the tribe, and the past, present, and future cumulative impacts to this resource from

Phelps Dodge's mining operations that are connected to this land exchange, and (3) that BLM failed to consult with the tribe in any meaningful way. (SOR at 23-24.) These claims have been addressed in prior BLM responses and BLM's responses will not be repeated.

Appellants' claims 30-32 are related. Claim 30 alleges that BLM failed to include a disclosure of the known unauthorized uses and adverse claims to Phelps Dodge's use of the San Francisco River and Chase Creek. Claim 31 asserts that the decision violates the Public Trust Doctrine and Federal reserved rights to water in Chase Creek and the Gila River, and that the ROD and FEIS failed to consider Indian trust resources in violation of FLPMA. Claim 32 states that the destruction of Chase Creek by Phelps Dodge violates Federal and state water law, the Public Trust Doctrine and Federal reserved rights of the United States and the Tribe. (SOR at 24-25.)

In response, BLM states that it has not received any explanation concerning what the Tribe believes are unauthorized uses of the San Francisco River and Chase Creek. BLM claims that it is unaware of any unauthorized uses by Phelps Dodge on these water courses. (Answer at 83; see Affidavit of Hana West, Hydrologist/Watershed Specialist, Safford Field Office, at Exh. P to Answer.) BLM explains that any water use from the San Francisco River or Chase Creek must ultimately conform to the Gila River Adjudication. (Answer at 84.) BLM further states that its decision to approve exchange AZA-28789 does not authorize any existing or new use of water in the Gila River Basin. Id. With respect to Chase Creek, BLM states that the impacts on that watershed from any foreseeable uses of selected lands are identified in the ROD at 13-15. Id. Moreover, foreseeable uses of the selected lands are not expected to increase water use at the Morenci mine. Id. As Ms. West observed in her affidavit:

The BLM decision to approve exchange AZA 28789 does not change, alter or otherwise amend any existing water right or otherwise authorize any new use of water in the Gila River basin. Any additional water used for the mining operation expected on the selected lands would require perfection of an associated water right and conformance to the Gila River adjudication.

(Answer at 84, quoting West Affidavit, ¶ 7.)

In response to Appellants' claims that exchange AZA-28789 will somehow destroy or otherwise harm the Chase Creek watershed, BLM explains that the streamflow in Chase Creek is currently diverted and routed around the Morenci mine and returned to its natural channel. (Answer at 85.) Water returned to the natural channel is free then to flow to the San Francisco River, a tributary of the Gila River. Id. The impacts from foreseeable mine-related uses of selected lands on Chase Creek will be only 0.002 percent of the average annual flow of the San Francisco River and 0.00008 percent of the average annual flow of the Gila River at the head of Safford Valley. (Answer at 86.) BLM notes that this volume of streamflow impacted

would not be measurable using standard streamflow gauging techniques. Id. Moreover, BLM states, this minimal reduction in streamflow would have no impact on fish and wildlife habitat or recreational use of the San Francisco River, Gila River, and/or San Carlos Lake. Id.; ROD at 14.

We turn first in our discussion to Appellants' contention in their SOR that BLM's ROD and FEIS for the Morenci Land Exchange did not comply with either NEPA or FLPMA. Thus, Appellants contend that the information gathered and presented in the ROD was based on inadequate environmental analysis in violation of NEPA, 42 U.S.C. § 4321 (1994), and its implementing regulations at 40 C.F.R. Part 1500.

[1] NEPA is primarily a procedural statute designed "to insure a fully informed and well-considered decision." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). It requires that an agency take a "hard look" at the environmental effects of any major Federal action. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

In Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989), the Court stated:

[I]t is now well settled that NEPA does not mandate particular results, but simply prescribes the necessary process. * * * If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. * * * Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.

An EIS must fulfill the primary mission of NEPA, which is to ensure that a Federal agency, in exercising the substantive discretion afforded it to approve or disapprove a project, is fully informed regarding the environmental consequences of such action. See 40 C.F.R. § 1500.1(b) and (c); Natural Resources Defense Council v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987).

In deciding whether an EIS has done so, it is well settled that a rule of reason will be employed such that the question becomes "whether an EIS contains a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (quoting from Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)).

The two main thrusts of Appellants' NEPA arguments are, first, that the FEIS is inadequate because it does not analyze the direct, indirect, and cumulative impacts of existing mining operations at the Morenci mine and the cumulative impacts resulting from other mining operations in the Gila River watershed, and that if they had been properly analyzed, the

exchange would not have been found to be in the public interest. Appellants' second major thrust of arguments relates to the alternatives considered and the claim that the FEIS discussion of alternatives was insufficient and, in particular, the "no-action" alternative is flawed because it unjustifiably assumes the same environmental consequences without the land exchange.

We address first the claim that BLM's examination of mining impacts resulting from the exchange was inadequate and that the public interest was not served. The authority to conduct land exchanges is provided in section 206 of FLPMA, as amended, 43 U.S.C. § 1716 (1994). Under 43 U.S.C. § 1716(a) (1994), the requisite public interest determination in deciding whether to approve an exchange can include mineral development to meet the "needs of State and local people." Thus, whether the exchange facilitates the consolidation of mineral interests can be, and, in this case, was a factor, under 43 C.F.R. § 2200.0-6(b), in making the requisite public interest determination.

Under the regulations at 40 C.F.R. §§ 1508.7 to 1508.8, BLM must look at direct and indirect effects as well as cumulative impacts of agency actions. A direct effect of the land exchange would be an effect "caused by the action" and which "occur[s] at the same time and place." 40 C.F.R. § 1508.8(a). The mining and/or mineral development on the selected lands, on which 228 unpatented mining claims exist, is not caused by, or a direct effect of, the land exchange. Similarly, indirect effects which BLM must analyze are limited to those "caused by the action," even though "later in time and farther removed in distance," provided they "are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Because Morenci had every right to conduct mining operations consistent with its unpatented mining claims on the selected lands regardless of whether the exchange is approved or not, BLM was not required to analyze as an indirect effect that which would occur independent of its decision to approve the land exchange. The same rationale applies with regard to cumulative impacts. While 40 C.F.R. § 1508.7 requires that BLM assess "reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions," this does not mean that BLM must consider foreseeable events in an EIS for a land exchange that will occur regardless of the decision under appeal. As Save the Yaak Committee v. Block, 840 F.2d 714, 719 (9th Cir. 1988), instructs, unless the approval of exchange AZA-28789 and mining-related activities on the selected lands are "connected actions" as defined in 40 C.F.R. § 1508.25(a)(1), the mining activities need not be addressed in the FEIS for the land exchange. For this reason, the arguments of Appellants that the FEIS and ROD are deficient for failure to discuss the impact of mining-related activities on the selected lands are without merit.

Nevertheless, BLM did carefully address air and groundwater impacts arising from the Morenci mine in Chapters 3 and 4 of the FEIS. Hydrologic studies, groundwater flow patterns and groundwater quality impacts of the Morenci mine were addressed in Chapter 3. See FEIS at 3-16. The

"Cumulative Impacts" section of the FEIS concluded that "[s]urface and groundwater quality and air quality would not be affected by the Proposed Action." (FEIS at 4-32.) The FEIS determined, that within the region, present, and foreseeable actions that have the potential to impact water and air resources "are regulated by numerous federal and state regulations including the CWA, CAA, and APP program." (FEIS at 4-32 to 4-33.) The FEIS determined further that "in light of past land tenure adjustments and the protections provided by existing environmental regulations, the Proposed Action does not have the potential to contribute to or result in cumulative adverse impacts to physical resources." (FEIS at 4-33.)

[2] Nor can we say that the land exchange was not in the public interest. The approved Safford District RMP identifies the selected lands as public lands targeted for disposal. The offered lands, consisting of four parcels encompassing 1,040 acres of privately owned and environmentally sensitive land within Graham, Greenlee, Cochise, and Pima Counties, support a variety of wildlife species, sensitive plants, historical and cultural resources, and scenic values. Although Appellants have claimed that the valuation of the selected lands by BLM was inadequate, they offer no independent appraisal or any other evidence as required to rebut the BLM valuation. As this Board has held in Donna Charpied, *supra*, and Brent Hansen, *supra*, Appellants are required to make an evidentiary showing that the BLM appraisal is in error. This is normally in the form of an independent appraisal. *Id.* Appellants have conducted no appraisals and have offered no evidence that would contradict BLM's appraisal. BLM properly denies a protest to a proposed land exchange where the protestant fails to demonstrate that BLM violated the public interest requirement of section 206(a) of FLPMA, 43 U.S.C. § 1716(a) (1994), or Executive Order No. 12898.

Appellants assert that BLM's FEIS discussion of alternatives was insufficient. Specifically, they allege that BLM failed to consider fully the no-action alternative, because it unjustifiably assumes the same environmental consequences without the land exchange.

[3] NEPA requires that an EIS consider "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii) (1994). Regulations of the CEQ provide that Federal agencies shall, to the fullest extent possible, "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. § 1500.2(e). Further, agencies shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). Agencies need not discuss alternatives that would not satisfy the purposes of the proposed action or that are remote and speculative. Headwaters, Inc. v. BLM, Medford District, 914 F.2d 1174, 1180-81 (9th Cir. 1990); City of Aurora v. Hunt, 749 F.2d 1457, 1467 (10th Cir. 1984); Roosevelt Campobello International Park Commission v. U.S. Environmental Protection Agency, 684 F.2d 1041, 1047

(1st Cir. 1982). In a leading case on the requirement to discuss alternatives, Judge Leventhal stated that "the alternatives required for discussion are those reasonably available * * *." Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972). Judge Leventhal continued: "In the last analysis, the requirement as to alternatives is subject to a construction of reasonableness * * *." Id. at 837.

In the FEIS, BLM analyzed three alternatives: the proposed action alternative, the equal appraised value alternative (preferred alternative), and the required no-action alternative. The proposed action is a land exchange between Phelps Dodge and BLM. Completion of the exchange would result in Phelps Dodge acquiring 27 selected parcels within or adjacent to its Morenci mine. In exchange, BLM would acquire four offered lands parcels located in the Safford District within the Gila Box Ecosystem, Cienega Creek, and the Dos Cabezas Mountains. See FEIS at 2-2 though 2-8.

The equal appraised value alternative (preferred alternative) was developed to address a greater than 25-percent disparity in the monetary value of the selected and offered lands packages. Under this alternative, all the selected lands (approximately 3,758 acres) would be exchanged for a modified offered lands package (minimum of 960 acres). As part of this alternative, all or a portion of one of the four offered lands parcels (240-acre Clyne Parcel) would be removed from the offered lands package in order to equalize the values with those of the selected lands. This would minimize the need to equalize values through a cash payment. (FEIS at 2-8.) This alternative was selected by BLM in the ROD.

The no-action alternative would result in no lands being exchanged. The selected lands would remain publicly owned and administered by BLM according to the multiple-use management directives in FLPMA and the amended RMP. Future management actions by the BLM for these lands would include processing a formal Mining Plan of Operations proposal should one be submitted by Phelps Dodge and/or applications to patent existing mineral claims, as Phelps Dodge owns mining claims to most of the selected lands. Phelps Dodge would retain ownership of the offered lands and could use and manage the properties in accordance with the rights, privileges, and obligations of private ownership. (FEIS at 2-8.)

Appellants' principal argument with BLM's discussion of the alternatives is the claim that, if land exchange AZA-28789 were to be denied, Phelps Dodge would have to file a Mining Plan of Operations which would then be subject to "a NEPA EIS assessment" and application of more restrictive Federal regulations. See SOR at 11. Appellants allege that this factor was not given proper weight and discussion in the FEIS and thus the FEIS should be returned to BLM by this Board for further consideration. We are not persuaded. Appellants never explain nor even try to describe how the combined state and Federal regulatory structure carefully described by BLM in the FEIS following exchange is insufficient or inferior to the BLM structure. We also agree with BLM that mining-related activities on the

selected lands would be the same for all alternatives. Given the 238 mining claims of record on the selected lands (228 belonging to Phelps Dodge), the no-action alternative is not and never can be considered a "no-mining" alternative. In sum, the no-action alternative is a mining alternative with the only substantive difference being that development thereon will continue to be subject to BLM surface management regulations. For these reasons, Appellants' arguments that the no-action alternative is deficient because it does not differentiate between no-mining and mining alternatives is without merit.

Appellants claim that the FEIS and ROD are deficient because they fail to describe the environmental impacts from other reasonable alternatives beyond the proposed, preferred, and no-action alternatives. In fact, BLM did examine three other alternatives, but they were not studied in detail in the FEIS either because they did not meet the project purpose and need, did not conform to the RMP, included inadequate information, presented jurisdictional problems, or presented unacceptable environmental impacts. (Answer at 39.) These alternatives included a BLM direct sale to Phelps Dodge and acquisition of offered lands through the Land and Water Conservation Fund, a minimized selected lands configuration, and a different offered lands package. See FEIS at 2-15 to 2-17. We find that Appellants have failed to establish that BLM's decision to eliminate these and other alternatives was either arbitrary, capricious, or an abuse of discretion. See 5 U.S.C. § 706(2)(A) (1994).

Under 40 C.F.R. § 1502.14(a), an agency is required to "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which are eliminated from detailed study, briefly discuss the reasons for their having been eliminated." (Emphasis added.) In each case BLM briefly discussed the reasons for eliminating alternatives. (FEIS at 2-15 to 2-17.) Appellants demand more detail, asserting that it is legally required. We are not persuaded. BLM has provided the brief description called for by the regulation. Appellants have shown no error.

Under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1994), the Secretary was directed to take, by regulation or otherwise, any action necessary to prevent unnecessary or undue degradation of public lands. Further, 43 C.F.R. § 3809.0-5(k) provides that

[u]nnecessary or undue degradation means surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue

degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation.

See 43 C.F.R. § 3809.2-2; Charles S. Stoll, 137 IBLA 116, 125 (1996); Arthur Farthing, 136 IBLA 70, 73 (1996). We likewise find that the requirements of FLPMA have been met in BLM's analysis of the Morenci Land Exchange.

Appellants urge that mitigation measures necessary to ensure compliance are inadequately described in the FEIS and ROD. They contend that NEPA and its implementing regulations require that mitigation measures and plans supporting those measures be discussed during the NEPA process. Both BLM and Phelps Dodge characterize these as operational details, claiming that they are not required to be scrutinized in detail in an EIS. Whether or not these required actions may be characterized as mitigation measures or plans supporting mitigation measures, we find no merit to Appellants' argument. Details of mitigation measures are not required to be set forth in the FEIS. As the Supreme Court stated in Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989): "To be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences." However, the Court cautioned that

[t]here is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other * * * it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.

Id. at 352-53.

Appellants likewise find fault with BLM's cumulative impacts analysis because it is contained in only a few pages of the FEIS and allegedly failed to address all past, present, and future operations. See FEIS at 4-29 through 4-32. While admitting that the section in the FEIS titled "Cumulative Impacts" is only a few pages long, BLM and Phelps Dodge contend that BLM analyzed past and present activities in the "Affected Environment" section of the FEIS within Chapter 3 and then concluded in the cumulative impacts section that the incremental impacts of the project would be negligible. No more is required, they assert.

CEQ regulations require that a Federal agency must consider the potential cumulative impacts of a planned action together with other past, present, and reasonably foreseeable future actions. 40 C.F.R. § 1508.7; see Fritiofson v. Alexander, 772 F.2d 1225, 1243-44 (5th Cir. 1985); G. Jon

and Katherine M. Roush, 112 IBLA 293, 305 (1990). Appellants charge that BLM arbitrarily narrowed its review of future activities to exclude those related to mining activity. Although Appellants assert that BLM must show the statutory or regulatory basis for this unilateral and arbitrary reduction in the scope of its NEPA review, we find that the burden is on Appellants to show that such a guideline is unreasonable or illegal.

We find that the FEIS adequately considered the cumulative impacts of the Morenci Land Exchange. The FEIS assesses the current environmental condition of the selected lands, which is within the Safford Resource Area, and details the current condition of various resources or areas of concern and the expected impact the exchange would have on them. (FEIS, Chapter 3.) BLM, moreover, met the standard established by the CEQ regulations at 40 C.F.R. Part 1500. Although BLM came to the conclusion that exchange AZA-28789 and the existing mining operation, located on private land, could not be considered to be connected, cumulative or similar actions, mining-related impacts resulting from foreseeable uses are presented in Chapters 3 (Affected Environment) and 4 (Environmental Consequences) and are summarized in Table 2-3 at 2-18 to 2-32 of the FEIS. Id. Respondent did not analyze direct or indirect adverse effects from mining within the context of the FEIS because mining is not, under applicable CEQ regulations, an impact of the land exchange, but rather was, and is, an identified use of the land whether the exchange occurs or not. Since mining-related activities on the selected lands would be the same for all alternatives, BLM was not required to include the impact of prospective mining activity in the FEIS.

As a related matter, we find no fault with BLM's overall scoping process. Extensive and thorough consultations were conducted. All significant interests were considered. We concur that the proper scope 1/ of the NEPA analysis in this case was a proposed land exchange and not a plan of operations filed pursuant to 43 C.F.R. § 3809.1-4. The authority to conduct land exchanges is provided in section 206 of FLPMA, and whether the exchange facilitates the "consolidation" of "mineral * * * interests" can be, and in this case, properly was a factor in making the required "public interest" determination. BLM properly denies a protest to a proposed land exchange where the protestant fails to demonstrate that BLM violated the public interest requirement of section 206(a) of FLPMA, 43 U.S.C. § 1716(a) (1994), or Executive Order No. 12898.

The claim of Appellants that a portion of the selected land actually is Tribal land is also without merit. The San Carlos Apache Tribe accepted compensation for loss of aboriginal lands, which included but were not

1/ "Scope" is defined in 40 C.F.R. § 1508.25 as the "range of actions, alternatives, and impacts to be considered in an environmental impact statement." Actions need only be considered in the same impact statement if they are connected, i.e., "closely related." 40 C.F.R. § 1508.25(a)(1).

limited to, the Morenci Land Exchange selected lands and therefore these lands are no longer sovereign tribal lands. As noted above, an Executive Order dated November 9, 1871, created the White Mountain Reservation, and an Executive Order dated December 14, 1872, added the San Carlos division to the existing White Mountain Reservation. Executive Orders dated August 5, 1873, and July 21, 1874, restored to the public domain former White Mountain Reservation lands in which the selected lands are located. On June 27, 1969, the Indian Claims Commission found that the San Carlos and White Mountain Apache tribes were entitled to recover the "fair market value of their aboriginal title lands," which included, but were not limited to, lands covered in the Executive Orders of August 5, 1873, and July 21, 1874. On September 12, 1972, the Indian Claims Commission awarded a final judgment to the San Carlos and White Mountain Apache tribes in a settlement of \$4,900,000 as compensation for these lands that had previously been taken from the tribes without compensation. Both the San Carlos and White Mountain Apache tribes agreed to this settlement by means of resolutions passed unanimously by the respective Tribal Councils. Thus, neither the selected nor the offered lands are sovereign tribal lands belonging to the San Carlos Apache Tribe. The Tribe has offered nothing to rebut the factual analysis set forth above.

Finally, Appellants raise serious allegations in their SOR concerning BLM's alleged failure to disclose Phelps Dodge's unauthorized use of the San Francisco River and Chase Creek, not to mention the alleged destruction of Chase Creek in violation of Federal and state water law, the Public Trust Doctrine and Federal reserved rights of the United States and the Tribe. These are totally unsubstantiated allegations. Appellants present no evidence in support of these charges, nor were they raised during the comment period for the FEIS. No evidence of destruction has been provided; no evidence of unauthorized use has been shown. These claims are without merit.

To the extent Appellants have raised other arguments in this case that have not been specifically addressed, they have been considered and rejected. See Glacier-Two Medicine Alliance, 88 IBLA 133, 156 (1985).

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from dismissing Appellants' protests are affirmed.

James P. Terry
Administrative Judge

I concur.

John H. Kelly
Administrative Judge

